

REVIEW: MELBOURNE SOCIAL EQUITY INSTITUTE, UNFITNESS TO PLEAD AND INDEFINITE DETENTION OF PERSONS WITH COGNITIVE DISABILITIES; AND JUSTICE, MENTAL HEALTH AND FAIR TRIAL

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1. McSherry B, Baldry E, Arstein-Kerslake A, Gooding P, McCausland R and Arabena K, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities*, Melbourne: Melbourne Social Equity Institute, 2017;
2. Justice, *Mental Health and Fair Trial*, London: Justice, 2017.

Towards the end of 2017, the long-established legal reform NGO, Justice, produced its report, *Mental Health and Fair Trial*. The output of a Working Group chaired by retired appellate judge, Sir David Latham, it contains 52 recommendations for changes in the criminal justice process in England and Wales. These refer to all stages, from the investigation of crime through to the process of sentencing. At around the same time, researchers linked to the Melbourne Social Equity Institute at the University of Melbourne have published their report on *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities*. The main focus of this report is the barriers faced by people experiencing cognitive disabilities and how appropriate supports are needed to allow access to justice on equal terms.

Two articles of the Convention on the Rights of Persons with Disabilities 2006¹ are of obvious relevance in this context. First, article 13 requires equal access to justice, with such “procedural and age-appropriate accommodations” as may be necessary to secure this. Secondly, article 14 provides the right to equal protection against arbitrary detention, and a component of this is that “the existence of a disability shall in no case justify a deprivation of liberty”.

The Committee on the Rights of Persons with Disabilities, the body of experts that exists by reason of article 34 of the Convention and has as its central task reviewing the implementation of the Convention, issued guidelines on article 14 in September 2015.² These make clear the view of the Committee that it is not permissible to detain someone on the basis of a risk posed to self or others that is linked to a psychosocial disorder or intellectual impairment.³ Its rationale is that, in the first place, the drafters of the Convention expressly rejected language that would have permitted detention if there was an impairment plus an additional feature such as risk to self or others.⁴ Secondly, the Committee notes that, in the context of liberty and security of the person being “one of the most precious rights to which everyone is entitled” (and specifically

¹ (United Nations [UN]) 2515 UNTS 3, UN Doc A/RES/61/106, Annex, GAOR 61st Session Supp 49, 65. (Adopted) 13th Dec 2006, (Opened For Signature) 30th Mar 2007, [Entered Into Force] 3rd May 2008

² United Nations Committee on the Rights of Persons with Disabilities, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities, Adopted during the Committee's 14th session, held in September 2015, available from the home page of the Committee. <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>.

³ Guidelines, paras 6, 10 and 13 relate to civil detention scenarios.

⁴ Guidelines, para 7.

that persons with intellectual disabilities and psychosocial disabilities enjoy the right),⁵ article 14 is “in essence, a non-discrimination provision”, such that it:

relates directly to the purpose of the Convention, which is to ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect of their inherent dignity.⁶

As such, detention in institutions “either without the free and informed consent” of the detainee or on the basis of a substitute decision-maker giving consent is arbitrary detention.⁷ The position of the Committee is that if a person poses a risk to others, they should be dealt with by the criminal law or other laws (in short, the same response irrespective of whether there is an impairment or not);⁸ and that if a person fails to secure psychiatric treatment they probably require, that should be viewed as no more than the consequence of the fact that the right to make choices “includes the freedom to take risks and make mistakes”,⁹ which has to be enjoyed equally by people experiencing disability.

Criminal processes that involve differential treatment – such as fitness to stand trial provisions – are criticised because they involve a “separate track of law” which invariably entails lower “due process and fair trial” rights, such that they breach article 13 as well as – if detention is involved – article 14.¹⁰ The Committee supports instead relevant support and procedural accommodations to ensure a fair trial following due process.¹¹

Naturally, the existence in so many countries of unfitness to stand trial laws (not to mention civil commitment laws) means that, if the Committee is correct, a lot has to be changed. The Latham Committee, however, is sceptical of the need for the removal of unfitness to stand trial laws. At paras 1.14-1.19 of its Report, it expressly rejects the

⁵ Guidelines, para 3.

⁶ Guidelines, para 4. This is reinforced by the non-discrimination and equal protection of the law provisions of article 5 (see Guidelines, para 5) and the recognition of the equal right to make autonomous choices in article 12 (see Guidelines, para 8).

⁷ Guidelines, paras 8 and 10. It also breaches article 12; and the invariable corollary of treatment without consent also breaches articles 12 and 25 (the latter relating to healthcare matters) and may well be torture or inhuman or degrading and so in breach of article 15. See Guidelines, paras 10-12 for these points.

⁸ Guidelines, para 14.

⁹ Guidelines, para 15. This is noted to be part of article 12 as well.

¹⁰ Guidelines, para 14. See also para 16, in which the Committee makes clear that it finds problematic declarations as to unfitness to stand trial or of incapacity to be found criminally responsible. Note also para 20, in which it suggests that there should be no use of “security measures” after findings of no responsibility in the ground of insanity. The Committee does not find problematic the idea of diversion from the criminal justice system per se, or the use of such approaches as restorative justice; but it does find it problematic for this to lead to detention under mental health laws and any treatment without consent: see para 21.

¹¹ Guidelines, para 14, endorsing the “United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings before a Court”, adopted by the Working Group on Arbitrary Detention, [UN Doc A/HRC/30/36] of 29th April 2015, at para 126. This refers to such matters as supported decision-making, the need for accessible buildings and information, deinstitutionalisation and independent living, and remedies for any breaches of rights. These are all consistent with the requirements of articles 9 and 19 of the CRPD (relating to accessibility and community living).

idea, commenting that it could not be consistent with human rights principles to allow a trial of someone lacking any insight into the allegation against them or ability to instruct their legal team.¹² Unfortunately, the Latham Committee does not engage with the CRPD Committee's Guidelines document summarised above: instead, they deal with the CRPD Committee's General Comment No 1 on the implications of article 12 of the CRPD and the need for supported decision-making.¹³ However, there is also reference made to documentation prepared for a meeting under the auspices of the High Commissioner for Human Rights in September 2015, which noted that it was identified that fitness to stand trial procedures should be abolished;¹⁴ accordingly, the Latham Committee's view as to the impropriety of the CRPD Committee's views would probably be the same.

The report from the Melbourne Social Equity Institute, at pages 22-26, gives a brief summary of the main principles arising under the CRPD. It suggests, at page 25, that there is ongoing room for debate as to whether they are impermissible or not. The project giving rise to the report also produced several academic articles relating to fitness to plead.¹⁵ The conclusion of one of these was that the views of the CRPD "set a challenge ... to abandon current unfitness to plead law", and that although such wholesale change was "likely to be the one path that will lead to full respect for the rights" of those affected, incremental change in various areas was the more realistic path.¹⁶

This explains why the second part of the report is headed "The Disability Justice Support

¹² They point out that the Law Commission of England and Wales also reached the conclusion that it was necessary to reform rather than abolish the unfitness to stand trial process: Law Commission, *Unfitness to Plead* (Law Com No 364, 2016).

¹³ United Nations Committee on the Rights of Persons with Disabilities: General Comment No 1 (2014), Article 12: Equal recognition before the law [UN Doc CRPD/C/GC/1] (19th May 2014).

¹⁴ JUSTICE, *Mental Health and Fair Trial*, London: Justice, 2017, p 17, text around fn 31, which refers to OHCHR, 'Expert meeting on deprivation of liberty of persons with disabilities: Background note' (9 September 2015).

¹⁵ Arstein-Kerslake, Anna, Piers Gooding, Louis Andrews, Bernadette McSherry, '*Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities*' (2017) 17 *Human Rights Law Review* 399 is cited for the proposition that there is ongoing debate. Another article that focuses on Australia is Gooding, Piers, Anna Arstein-Kerslake, Louis Andrews and Bernadette McSherry, 'Unfitness to Stand Trial and the Indefinite Detention of People with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change' (2017) 40(3) *Melbourne University Law Review* 816. See also Piers Gooding, Anna Arstein-Kerslake, Sarah Mercer and Bernadette McSherry, 'Supporting Accused Persons with Cognitive Disabilities to Participate in Criminal Proceedings in Australia: Avoiding the Pitfalls of Unfitness to Stand Trial Laws', (2017) 35(2) *Law in Context* 64. For a review of various recent proposals for reforming unfitness to stand trial laws, see Gooding, Piers and O'Mahony, Charles 'Laws on unfitness to stand trial and the UN Convention on the Rights of Persons with Disabilities: Comparing reform in England, Wales, Northern Ireland and Australia', (2016) 44 *International Journal of Law, Crime and Justice* 122.

¹⁶ Arstein-Kerslake, Anna, Piers Gooding, Louis Andrews, Bernadette McSherry, '*Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities*' (2017) 17 *Human Rights Law Review* 399, 418. The report also indicates that universal accessibility rather than creating "separate justice procedures" is "the most comprehensive way to comply with human rights law": McSherry B, Baldry E, Arstein-Kerslake A, Gooding P, McCausland R and Arabena K, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities*, Melbourne: Melbourne Social Equity Institute, 2017, 58.

Program”, which reports on research into the value of support persons working with lawyers in fitness situations to reduce the occurrence of findings of unfitness and the potential consequences. As the case of *Noble v Australia*¹⁷ indicates, these consequences can be the most problematic aspect of the process: this case involved a man found unfit to stand trial and held in prison conditions because no other facilities were found suitable. The relevant law, in Western Australia, made no provision for the trial to occur if the person became fit, which was particularly problematic because, when Mr Noble sought to argue that he had become fit to be tried, the prosecutors concluded that there was inadequate evidence to support a conviction.¹⁸ Mr Noble was detained for over 10 years before being released subject to numerous conditions even though there was by then no prospect of any conviction – and equally no way for him to have recorded the acquittal that the prosecution now conceded he deserved.

This arose from an unsatisfactory and out of date unfitness law in which a disposal followed from the finding. Even the more modern approach of investigating whether elements of the offence are made out commonly pose problems for defendants because the focus on the physical elements of the offence in question rather than mens rea elements. This means that an acquittal based on a lack of that mens rea, or reliance on such features as self-defence in an assault scenario, are essentially unavailable because they turn on the defendant's perceptions, which will not be investigated if he or she does not give evidence. Hence, being supported to the extent that the defendant is fit to stand trial may bring him or her significant advantages.

The Melbourne Social Equity Institute report sets out the positive aspects of using trained support workers, particularly for defendants from indigenous communities, who are disproportionately affected. It also discusses some of the potential frictions caused by support persons not having legal knowledge and potentially being compellable witnesses on the current state of the law. One of the potential advantages described is of the ability to produce a suitable package that would satisfy the prosecution that the matter could be diverted from the criminal justice system, producing potentially significant cost savings.

The Latham Committee is also supportive of such mechanisms. The use of intermediaries to facilitate communication is an established feature of the English criminal courts, though the Committee calls attention to it being a very limited number.¹⁹ They also raise their concern that Practice Directions and appellate decisions undermine the prospects of intermediaries being available for the whole trial, apparently for cost reasons, reliance being placed instead on untrained judges and advocates to muddle through.²⁰ They suggest that the whole system should be revised

¹⁷ United Nations Committee on the Rights of Persons with Disabilities, Views Adopted by the Committee under Article 5 of the Optional Protocol, Concerning Communication No. 7/2012, [UN Doc CRPD/C/16/D/7/2012] (10 October 2016), [2017] MHLR 215.

¹⁸ Indeed, it seems that the victims had recanted any allegations made: McSherry B, Baldry E, Arstein-Kerslake A, Gooding P, McCausland R and Arabena K, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities*, Melbourne: Melbourne Social Equity Institute, 2017, 17, and a newspaper report referred to at endnote 37.

¹⁹ JUSTICE, *Mental Health and Fair Trial*, London: Justice, 2017, p 66, para 4.20.

²⁰ *ibid* p 67, paras 4.20-4.22.

and that the arrangements in place for witnesses who need intermediaries should be extended to cover defendants.²¹ As for judges, the Latham Committee suggests that courts should have designated judges, with the relevant training, who take over the case management of all cases involving vulnerable defendants, with relevant protocols in place to ensure reasonable accommodations are made and supplemental powers such as the ability to require prosecutors to give reasoned decisions for proceeding.²² Training for advocates is also supported, and the Committee notes that whilst there is a range of material already available for practitioners, the level of take-up is not known.²³

A telling comment made by the Latham Committee, in understated language, is that, "It is something of an anomaly that so much reliance is placed on AAs during the investigative stage, yet there is no assistance provided to defendants at court". "AAs" are the Appropriate Adults who have to be secured for interviews with people suspected to be vulnerable. Failure to secure them means that there is a significant risk that any admissions in interview will be found inadmissible for failure to abide by the obligations to use an Appropriate Adult, required by the Police and Criminal Evidence Act 1984 and the Codes of Practice issued under it. The Committee, however, has various suggestions to make for steps at the investigation and charge stage: this includes having "liaison and diversion" professionals from health and social care services conduct screening of people in police custody in order to provide a more robust assessment of vulnerability at the outset; and properly trained prosecutors who can assess the need to charge, assisted by diversion panels of mental health practitioners who could coordinate a support package that might tilt the public interest away from prosecuting and into some form of diversion. As has been noted above, the Melbourne Social Equity Institute report makes the point that this will produce significant fiscal benefits.

The Latham Committee also makes recommendations as to changes at the sentencing stage, including the involvement of liaison and diversion professionals to make recommendations on options available to the court. Its views take on a sense of urgency when the context is set, which is the overrepresentation in the prison population of England and Wales of those who will be in need of mental health services of some sort: figures as to this are set out, though with the call for more research. Nonetheless, the Committee was able to say that:

The greater prevalence of mental ill health and learning disabilities of those in contact with the criminal justice system points to a failing to appropriately address their concerns by the public sector at large. Ultimately it suggests that vulnerable people are being criminalised rather than given the support and treatment that they need.²⁴

Similarly, the authors of the Melbourne Social Equity Report note that their specific concerns about fitness to stand trial laws should be viewed in the wider context, namely that "A growing body of research indicates that persons with cognitive disabilities are significantly over-represented throughout criminal justice systems of high-income

²¹ *ibid* pp 68-696, paras 4.24-4.25.

²² *ibid* pp 70-73, paras 4.29-4.33.

²³ *ibid* p 60, para 4.8, and p 74, para 4.34.

²⁴ *ibid* p 13, para 1.6.

countries, including Australia" (and details relating to this are set out, supplemented by the intersectional problem for indigenous people).²⁵

Both reports, which contain a wealth of references to other relevant research, make recommendations that ought to be taken seriously. They suggest and justify changes that should be considered across jurisdictions as efforts are made to improve the situation for defendants who are vulnerable but have the same right to access justice as anyone else. One can only hope that they do not get placed on the special shelf for worthy reports that are welcomed but never actioned. Fortunately, the Committee on the Rights of Persons with Disabilities will provide a constant reminder that things need to be made better, which can only increase the chance of action.

²⁵ McSherry B, Baldry E, Arstein-Kerslake A, Gooding P, McCausland R and Arabena K, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities*, Melbourne: Melbourne Social Equity Institute, 2017, 13-14.